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HOW BOTSWANA AND MAURITIUS EXITED THE EU HIGH-RISK THIRD COUNTRY LIST BY ADAPTING THEIR APPROACHES TO BENEFICIAL OWNERSHIP AND RESIDENCE

DANIEL WALKER*

On 22 February 2022, the Mauritian Ministry of Financial Services and Good Governance issued a communique reporting the country's removal from the European Union ('EU') List of High-Risk Third Countries. This list is also called the Anti-money Laundering and Countering Terrorist Financing List ('AML/CTF');¹ or, less affectionately, the Blacklist. Mauritius issued this report a month after the European Union released its *Commission Delegated Regulation (EU) 2022/229*,² removing Botswana and Mauritius from the AML/CTF.

The EU placed Mauritius and Botswana on the Blacklist in May 2020³ after adopting updated criteria for assessing high-risk third countries⁴ and publishing its revised methodology for identifying these high-risk jurisdictions.⁵ These updated criteria and procedures relegated the tax regimes of Mauritius and Botswana as strategically '[deficient] on anti-money laundering and counter-terrorist financing...', such that they 'pose significant threats to the financial system of the Union.'⁶ Placement on the Blacklist encumbers States with increased monitoring, regulatory requirements, and global trade restrictions that can result in a heavy economic toll. Moreover, to exit the list, countries must remediate deficiencies in cooperation with the EU and Financial Action Task Force ('FATF'), each of which must be satisfied with the improvements made.

Mauritius and Botswana passed a bevy of substantial laws in just over a year to satisfy the EU and FATF, earning an exit from the Blacklist. Among the many changes, enhancements to each country's transparency measures were central. Adopting new approaches to beneficial ownership and residence in each country is at the core of this transparency.

This work will explore how Mauritius and Botswana leveraged new approaches to beneficial ownership and residence to meet EU standards for tax regime transparency, resulting in each country's removal from the EU Blacklist. This analysis will begin with an economic overview of Mauritius and Botswana. What follows will be an introduction to the EU AML/CTF list, followed by how and why the EU placed Mauritius and Botswana on the list. Finally, this work will look at how Mauritius and Botswana exited the list, and what that exit means for each country and other countries like them.

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¹ Note: this list also appears as 'AML/CFT' in some publications.

² *Commission Delegated Regulation (EU) 2022/229* [2022] OJ L39, 8.

³ *Commission Delegated Regulation (EU) 2020/85* [2020] OJ L195, 3.

⁴ Ibid.

⁵ See *Methodology for Identifying High-Risk Third Countries under Directive (EU) 2015/849* [2020] OJ.

⁶ *Commission Regulation (EU) 2020/85* [2020] OJ L195, 3.

I. COUNTRY OVERVIEWS

A. *Mauritius*

Mauritius is an island nation just over 1,500 kilometres off the East coast of Africa. Colonized by the Dutch, French, and English before independence in 1969, Mauritius is home to around 1.5 million people of varying ethnicities. The island began as a source of sugar cane for colonial powers before branching into textiles and tourism for additional income. However, in 1992, with the passage of the *Offshore Business Act* ('OBA'), Mauritius endeavoured to convert itself into a service economy. The first object of the OBA obligated the Authority to 'license corporations to establish and carry on offshore business activities from within Mauritius...' ⁷ With this Act, Mauritius aimed to promote itself 'as a [international financial] centre for offshore business activities.' ⁸ It accomplished this by creating a Global Business Company ('GBC') licensing scheme, and launching an aggressive campaign to ratify double taxation agreements ('DTAs') across the African continent. As a result, Mauritius has successfully incentivized the inflow of foreign capital into the country, leading to its unprecedented economic growth, while drawing the ire of some competitors and observers.

B. *Botswana*

Botswana is a landlocked country in the Southern portion of Africa with a population of 2.4 million people. It is touted for its stable economic and political environment after gaining its independence from British rule in 1966. Whereas the Botswana economy leaned heavily on providing labour to South Africa before independence, one year after British abdication, Botswana discovered the first of three diamond deposits. While benefitting from the direct trade and sale of its diamonds, Botswana soon leveraged them and a corporate-favourable tax regime to attract foreign investment and grow its services sector; these services – primarily financial – now make up more than 50% of Botswana's GDP. ⁹

C. *Comparative Profile*

Botswana and Mauritius are associated with each other in this article because the two are often cited together as economic growth outliers. ¹⁰ They also occupy niche corners of the global capital market: Mauritius, a low-to-no tax jurisdiction, and Botswana, a diamond-rich hotbed for foreign investment. Each nation has used multi-national enterprise ('MNE') friendly tax regimes to attract capital investments that undergird their economies. These favourable regimes have historically been characterised by low composite effective average tax rates ('CEATR') and privacy for entities seeking residence. As such, each country has gained a normative reputation as a tax haven, resulting in its listing on the EU EML/CTF. Specifically, the EU Commission listed both jurisdictions, citing *inter alia*, a lack of transparency in each country's tax regimes.

Mauritius and Botswana together represent archetypal risk models for comparable emerging economies negotiating the advantages of tax-based investment incentives. The new DTA between the two may also make for an updated litmus test for how these countries, and countries like them,

⁷ *The Mauritius Offshore Business Activities Act 1992* (Mauritius) s 4(a).

⁸ *Ibid* s 4(f).

⁹ Arthur Silve, 'Botswana and Mauritius: Two African Success Stories Capitalizing on Rents without Mortgaging Development' (2012) 242(2) *Afrique Contemporaine* 29, XII.

¹⁰ *Ibid*.

will adjust in a post-Organization for Economic Cooperation and Development (‘OECD’) Base Erosion and Profit Shifting (‘BEPS’) world.¹¹ How well will the BEPS action plan curtail the use and abuse of tax havens? Will the action plans stymie capital flows through emerging economies that might otherwise remain outside traditional capital markets? Botswana and Mauritius may clue us into these questions.

II. THE EUROPEAN UNION ANTI-MONEY LAUNDERING & COUNTERING TERRORIST FUNDING LIST

A. *Foundations and Authority for the AML/CFT List*

The current iteration of the AML/CFT list is a product of *European Union Directive 2015/849* (‘2015/849’) – as amended by *EU Directive 2018/843* (‘2018/843’) (together known as the ‘AMLD’). The objectives and interworking of these directives, and the clauses therein, create the European Commission’s (‘The Commission’s’) position on what unsatisfactory transparency in a tax regime encompasses, and the authority to list countries that pose a threat to the EU financial system by violating its definition of transparency. The Commission uses these directives, in coordination with the FATF, to screen and potentially list countries ‘representing a risk to the international financial system,’ which the Commission presumes to be a risk to EU markets.¹²

Article 9 of the AMLD obligates the European Commission to ‘identify high-risk third countries having strategic deficiencies in their regime on anti-money laundering and countering the financing of terrorism.’¹³ This article empowers the Commission to identify and list jurisdictions with ‘strategic deficiencies about that country’s legal and institutional AML/CFT frameworks.’¹⁴

B. *How the AML/CFT Addresses Beneficial Ownership*

Defining *Beneficial Ownership*, and when it applies, is not an exact science. This becomes even more difficult when residency rules and practices shroud where a business is located or incorporated. In hopes of relieving the tension between subjectivity and the need to anchor policy, the OECD imparts that ‘the term “beneficial owner” should be understood in its context... and in light of the object and purposes of the [Model Tax] Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.’¹⁵ Article 9 of the AMLD refines the fiscal evasion and avoidance context with its ‘legal and institutional’ clause and the five pillars defining an effective AML/CFT framework. They are as follows: 1) criminalisation of money laundering and terrorist

¹¹ On 17 March 2023, the Mauritian Cabinet approved signing a new double taxation agreement to ‘comply with the OECD/G20 Base Erosion and Profit Shifting recommendations.’ See Office of the Prime Minister, Mauritius, ‘Highlights of Cabinet Meeting’ (Web Document, 17 March 2023) 2 [5] <<https://pmo.govmu.org/CabinetDecision/2023/Highlights%20of%20Cabinet%20Decisions%2017%20March%202023.pdf>>.

¹² *Commission Delegated Regulation (EU) 2020/85* [2020] OJ L195, 3.

¹³ Explanatory Memorandum, *Commission Regulation 2015/849* [2015] OJ L141, 90.

¹⁴ *Ibid* art 9(2)(a-c).

¹⁵ OECD, *Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention* 3 [12.1], (2017). See also OECD, *The 2014 Update to the Model Tax Convention*, 12 [12.1], (2014) (Referencing the 2012 FATF recommendation for combating money laundering and financing of terrorism, where *Beneficial Owner* is further defined as ‘the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.’).

financing; 2) measures relating to customer due diligence; 3) requirements relating to record-keeping; 4) requirements to report suspicious transactions; and 5) the availability of accurate and timely information of the beneficial ownership of legal persons and arrangements to competent authorities. Pillar 5 strikes at the directive's objectives to protect the integrity, stability, and reputation of the EU's internal market by identifying and verifying the beneficial owners of a legal entity.¹⁶ Pillar 2 supports this function by imploring that due diligence processes produce accurate and up-to-date records of beneficial ownership.

While beneficial ownership does not represent the entirety of the Commission's transparency concerns, it does directly connect to the Commission's aim to identify the natural persons that are controlling a legal entity. Therefore, 'beneficial ownership' is often synonymous with identifying the natural person(s) involved in a dealing.

C. Beneficial Ownership and Residence re: Harmful Tax Competition

This contextual definition of beneficial ownership poses an issue because privacy can be an incentive for attracting investment. Whether less reporting measures, desires to keep available funds out of the reach of litigants, or shielding individual investors from scrutiny, tax jurisdictions that provide a veritable vacuum of information provide an advantage for the companies that utilize them.

When a reasonable pursuit of privacy may become harmful in the preview of the Commission can be gleaned from the Economic and Financial Affairs Council of the EU (ECOFIN) Code of Conduct for business taxation, in which harmful tax competition involves, *inter alia*, 'tax benefits reserved for non-residents, and tax incentives for activities which are isolated from the domestic economy and therefore have no impact on the national tax base.'¹⁷

When combined with the 'any risk' approach to assessing threats to EU markets, the inclusion of non-resident-targeted tax benefits as harmful tax competition creates a fairly broad definition under which many incentive programs might fall. This is particularly true with the addition of the *economic isolation* criteria. Mauritius and its *OBA* scheme, as well as Botswana's tax incentives, seem a perfect match to the FATF and EU red flag criteria. However, when considering the type of foreign investment and businesses emerging economies are trying to attract, this kind of attention may be warranted in some circumstances and overbearing in others.

In the case of Botswana, the loadstar of its economy, diamonds, is departed from other aspects of its gross domestic product. This is particularly true when considering the knowledge-based businesses Botswana aims to attract. Through its *OBA* campaign, Botswana has endeavoured to attract, in part, capitalists developing portfolios on the African continent. These investors deploy capital in ventures associated with physical projects like infrastructure and mining,¹⁸ as well as through private equity and venture capital (VC) investment funds. Each instance of these investment types requires local expertise and services, as well as tax strategies that consider the best structures to minimize tax exposure.

¹⁶ Ibid [1-2], [13].

¹⁷ The European Commission, *Harmful Tax Competition Code of Conduct* (Web Page, 2023) <[https://taxation-customs.ec.europa.eu/harmful-tax-competition_en#:~:text=The%20Code%20of%20Conduct%20requires,Code%20\(%22rollback%22\)>](https://taxation-customs.ec.europa.eu/harmful-tax-competition_en#:~:text=The%20Code%20of%20Conduct%20requires,Code%20(%22rollback%22)>).

¹⁸ *The Mauritius Offshore Business Activities Act 1992* (Mauritius) s 40 para 3.

Mauritius, likewise, advertises itself as a centre of commerce for funds flowing to and through Africa. Its thorough network of DTAs presents a financial infrastructure that offers political, economic, and legal certainty for investors. Bolstering that infrastructure are experienced knowledge workers servicing banking and non-banking clients, insurance, various forms of asset management, and global investment funds. Mauritius' DTA relationships with China, Jersey, Luxembourg, Malta, and Singapore¹⁹ – jurisdictions that also find themselves in the EU AML/CFT spotlight – correspondingly make it a key player in capital markets spanning the globe.

In both cases, legitimate investors are provided with continental hubs through which to invest in African economies. Funds from these investors flow to projects that are critical to maintaining the growth and development of hubs like Mauritius and Botswana. They likewise increase trade between otherwise disconnected parts of the world.

This is not to say that this sort of tax competition for continental investment cannot blend with the harmful or illicit practices the EU is trying to limit. Investment funds, for instance, can involve an intricate network of entities that often 'have little or no employment, or operations, or physical presence in the jurisdiction in which they are created by their parent enterprises which are typically located in other jurisdictions (economies).'²⁰ These special purpose entities are sometimes known as 'brassplate,' 'holding' or 'shell' companies. These shells can themselves be inculcated in complex corporate groups that mask natural-person beneficial owners beneath multiple layers. While tax strategies utilising special purpose entities are not uncommon or illegal, they can also be abused to facilitate money laundering, tax avoidance, and tax evasion schemes.

Accounts of tax planning and strategies crossing the line into evasion, laundering, or base erosion and profit shifting have been commonplace for Mauritius and Botswana as long-time nominal tax rate jurisdictions favored by investment managers. However, scrutiny of the two countries increased considerably as investigative reporting projects like the Mauritius Leaks²¹ and Paradise Papers published findings that substantiated long held suspicions.²² These reports exposed a multitude of schemes ranging from safari companies using Mauritian and Botswanan inclusive tax strategies to shift profits off-continent,²³ to a Kenyan real estate firm fined for full-fledged tax evasion after using Mauritius' lack of transfer pricing or thin capitalization rules to execute fraudulent transactions.²⁴ These violations of the EU AML/CFT principles were enabled, in part, by the classic opacity of Mauritian and Botswanan financial reports. This lack of transparency allowed for the masking of the beneficial owners of an entity transacting with Mauritius or Botswana.

¹⁹ Mauritius Revenue Authority, *Double Taxation Avoidance Agreements* (Web Document, 2023) <<https://www.mra.mu/index.php/taxes-duties/international-taxation/double-taxation-agreements>>.

²⁰ OECD, *OECD Benchmark Definition of Foreign Direct Investment*, (2023) 100 [6.2].

²¹ International Consortium of Investigative Journalists (ICIJ), 'Mauritius Leaks', (Web Document, 2019) <<https://www.icij.org/investigations/mauritius-leaks/>>.

²² ICIJ, *Paradise Papers: Secrets of the Global Elite*, (Web Page, 2016) <<https://www.icij.org/investigations/paradise-papers/>>.

²³ Will Fitzgibbon, 'Out of Africa, Into Tax Havens', *ICIJ* (Web Page, 2016) <<https://www.icij.org/investigations/panama-papers/20160725-safari-tourism-offshore/>>.

²⁴ Will Fitzgibbon, 'Kenyan Firm Fined for Elaborate Tax Evasion Scheme Routed Through Mauritius', *ICIJ* (Web Page, 9 June 2022) <<https://www.icij.org/investigations/mauritius-leaks/kenyan-firm-fined-for-elaborate-tax-evasion-scheme-routed-through-mauritius/>>.

III. THE EU LISTING OF BOTSWANA AND MAURITIUS

A. *The EU Blacklist Process*

Procedurally, there are two paths to the AML/CFT list: through FATF listing, or by EU autonomous listing.²⁵ Each process is similar to the other, with EU autonomous triggers for listing and delisting differing in their specificity to the Union.²⁶ Both Mauritius and Botswana were listed by FATF first, but the EU still assesses countries against its autonomous listing criteria to make a final determination. Further, the EU takes FATF delisting as a recommendation, and uses it to assess whether the measures taken by the listed country are sufficient for delisting by the EU also.²⁷

The FATF process follows ‘a due process based on clear criteria.’²⁸ These criteria call for review when a jurisdiction: 1) Does not participate in a FATF-style regional body (‘FSRB’) or does not allow mutual evaluation review/results (‘MER’) to be published promptly, or 2) is nominated by a FATF member or an FSRB. The nomination is based on specific money laundering, terrorist financing, or proliferation financing risks or threats coming to the attention of delegations; or 3) has achieved poor results on its mutual evaluation.²⁹ The sub-focuses of these criteria are well beyond the scope of this paper, but they are summated as the evaluation of information ‘derived from mutual evaluation reports, from FATF members, or from the fact that the country is not participating in the work of any of the FATF-Style Regional Bodies (FSRB) and consequently not committing to implementing the FATF standards.’³⁰ This means that criteria for listing can range from technical analysis to mere non-cooperation.

It is notable that this low bar for ‘cooperation’ can be used as a mechanism for coercion, which bristles against the basic principles of fiscal sovereignty. the evaluative authority (the FATF) may act under systemic transparency's auspices but can still exert pressure due to the body's link to capital markets. When coupled with the procedural and normative consequences of being listed, this makes non-cooperation a somewhat self-sabotaging choice.

In any case, once a country is identified for listing, the FATF initiates a one-year observation period during which a regional extension of the FATF will work with the identified jurisdiction to remedy the noted deficiencies; this is the ‘grey list.’ If the deficiencies are not remedied, the FATF publishes its post-Plenary statements with the jurisdiction listed as a financial risk; this is the ‘blacklist.’³¹

The EU autonomous assessment uses a combination of Article 9 of the AMLD and a building block approach with the following eight criteria: 1) criminalisation of money laundering and terrorist financing; 2) measures relating to customer due diligence, record keeping and reporting of suspicious transactions in the financial sector; 3) the same measures in the non-financial sector; 4) the powers and procedures of competent authorities; 5) the existence of dissuasive, proportionate and effective sanctions; 6) the practice of competent authorities in international cooperation; 7) the availability and exchange of information on beneficial ownership of legal persons and legal

²⁵ *Commission Delegation Regulation 2020/85* [2020] OJ L195, 11 [3].

²⁶ *Ibid* 20 [3.2].

²⁷ *Ibid* 5 [j].

²⁸ *Ibid* 11 [3.1.1].

²⁹ Financial Action Task Force, *High-Risk and Other Monitored Jurisdictions* (Web Page, 2023) <fatf-gafi.org/en/topics/high-risk-and-other-monitored-jurisdictions.html>.

³⁰ *Commission Delegation Regulation 2020/85* [2020] OJ L195, 11 [3.1.1].

³¹ Financial Action Task Force, *Black and Grey Lists* (Web Page, 2023) <<https://www.fatf-gafi.org/en/countries/black-and-grey-lists.html>>.

arrangements; 8) implementation of targeted financial sanctions. It integrates these criteria into its three-staged approach to remedying the identified jurisdiction's deficiencies. After this process, the identified jurisdiction will have 12 months to remedy the deficiencies or be listed.³²

The consequences of being blacklisted by the EU can be two-fold depending on the methodology. The FATF consequence is increased monitoring and scrutiny until compliance is achieved.³³ The EU consequences imply the same increase in monitoring, but also call for the prohibition of 'persons and entities implementing financial instruments or budgetary guarantees from entering into new or renewed operations with entities incorporated or established in jurisdictions identified as high-risk third countries.'³⁴ Botswana and Mauritius suffered the combination of both sets of consequences.

B. *Why the FATF and EU Blacklisted Mauritius and Botswana*

Blocks two and seven of the EU assessment, when transposed over pillars two and five of the AMLD,³⁵ compose the reasons for the EU listing Mauritius and Botswana regarding their beneficial ownership and residency rules. In fact, in its October 2018 report, the FATF listed 'risks associated with legal persons...' as its first reason for recommending that Botswana enter increased monitoring status.

Despite reportedly successful MERs in 2008 and 2018, the FATF still listed Mauritius for increased monitoring in February of 2020 listing 'access to accurate basic and beneficial ownership information by competent authorities...' as the second of four reasons for the recommendation.³⁶

That Mauritius and Botswana avoided the grey and blacklists for years, only to be listed in 2020, is indicative of new beneficial owner rules adopted by the FATF and EU Commission based on FATF Plenary recommendations.³⁷ These new, 'tougher,'³⁸ rules presented novel issues for portions of Mauritian and Botswanan tax regimes. For instance, before making changes, the Mauritius GBC 2 license required no resident director, only a registered agent and office in Mauritius: a 'letterbox' arrangement. The GBC 2 also advertised confidentiality, safe harbour from audits, and no thin capitalisation or transfer prices rules (which is still the case today).³⁹ Mauritius has since changed its GBC regime, a transformation lauded in the FATF report placing Mauritius on the grey list. The FATF, though impressed with the reigning in of Mauritius' legislative opacity, desired still more access to beneficial ownership information.

³² Ibid 5 [ii].

³³ *Commission Delegation Regulation 2020/85* [2020] OJ L195, 11 [3.1.1].

³⁴ Ibid 49 [8].

³⁵ Pillar two refers to measures relating to customer due diligence, while pillar five references the availability of accurate and timely information of the beneficial ownership of legal persons and arrangements to competent authorities.

³⁶ FATF, *Jurisdictions under Increased Monitoring* (Web Page, 2020) <<https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2020.html>>.

³⁷ Since 2012, the FATF has put out a recommendation report. In 2021, a changing stance brought about recommendation 24 concerning transparency and beneficial ownership of legal person and arrangements.

³⁸ FATF, *Beneficial Ownership of Legal Persons Recommendation 24* (Web Page, 2023) <<https://www.fatf-gafi.org/en/topics/beneficial-ownership.html>>.

³⁹ Deloitte, 'Investing in Africa through Mauritius', (Web Document, 2013) <<https://www.aph.gov.au/DocumentStore.ashx?id=a12bb150-a320-4380-82cf-81627cf110fb&subId=303237>>.

The combined outcomes of the GBC 2 regime – and almost identical schemes in Botswana – had the potential to facilitate corporate groups made up of layers of shell companies. The lack of transparency meant that shell corporations could begin solely financial operations issuing dividends, royalties, and interest payments to wherever and whomever they wanted without the risk of audit.

The matter involving Jean-Claude Bastos de Morais, a Swiss-Angolan capitalist, and Appleby, a global law firm specializing in tax strategy and primary data source for the *Paradise Papers*, is illustrative of the type of threat opaque tax havens present to financial systems; a threat the FATF and EU are trying to mitigate with their respective lists.⁴⁰ Morais solicited Appleby to help him manage the Angolan sovereign wealth fund through a holding company, Quantum Global (QG). During the due diligence and know-your-customer phase of the vetting process, Appleby flagged Morais and the fund as a risky client. However, the loose regulatory requirements in Mauritius are structured to support such clientele, so Morais and the fund passed the KYC stage. The very next step involved getting the GBC license for QG, which was the all-important grant of access to Mauritian tax coverage. Bastos used QG to funnel USD 21.9 million in management fees to a QG-associated enterprise in Switzerland.

The opacity of the old Mauritius beneficial ownership regimes allowed for the masking of shell companies under the actual control of Morais and QG. These companies then took advantage of weak audit requirements to pay out large fees and dividends to associated enterprises while paying little-to-know tax on those transfers. All of this QG accomplished without a single office in Mauritius.

In another episode of tax avoidance via exploitation of beneficial ownership and residency rules, the Kenyan Revenue Authority (“KRA”) levied fines against a Kenyan real estate firm after uncovering over USD 200 million in hidden profits funnelled through Mauritius.⁴¹ In its decision, the KRA noted five key elements to the scheme including the lack of employees or assets in Mauritius. The entities involved only served to accrue profits in Mauritius so they could be transferred to Kenya without taxes.

These stories abound in Botswana as well,⁴² as the DTA between it and Mauritius – along with domestic tax policies allowing gaps in transparency – allowed MNEs to use either as a legal node for equally problematic taxation structures. These structures arguably disadvantaged other African countries that may not have been able to compete in a tax rate race to the bottom. However, they also pose a threat to the EU financial system in terms of tax base erosion and profit shifting, as well as through the added competition for financial residency. After all, the EU has its own tax jurisdictions that flirt with acting as tax havens on-par with how Mauritius and Botswana are viewed. These jurisdictions, like Switzerland and Jersey, benefit from the flow of billions of dollars of investment funds through the country. They do so by rent-seeking with other forms of tax and fees not associated with transfer pricing or taxing resident profits at market rates. When combined

⁴⁰ Will Fitzgibbon, “Tax Haven Mauritius” Rise Comes at the Rest of Africa’s Expense’, *ICIJ* (Web Document, 2017) <<https://www.icij.org/investigations/paradise-papers/tax-haven-mauritius-africa/>>.

⁴¹ Will Fitzgibbon, ‘Kenyan Firm Fined for Elaborate Tax Evasion Scheme Routed Through Mauritius’, *ICIJ* (Web Document, 9 June 2022) <<https://www.icij.org/investigations/mauritius-leaks/kenyan-firm-fined-for-elaborate-tax-evasion-scheme-routed-through-mauritius/>>.

⁴² Sean McGoey and Will Fitzgibbon, ‘Pandora Papers Reporting from Across Africa’, *ICIJ* (Web Document, 23 November 21) <<https://www.icij.org/investigations/pandora-papers/pandora-papers-reporting-from-across-africa/>>.

with trusts and investment funds leaving the European continent for tax havens, this presents an outflowing of capital that is disadvantageous for the EU. This threat of competition far outweighs the threat of terrorist funding. Thus, Mauritius and Botswana's removal from the Blacklist hinged on their willingness to cooperate in what the EU considers fair tax competition. For issues of beneficial ownership, this means the ability for the EU to know when European funds are being syphoned to offshore accounts such that they can tax the transfers or prevent them completely.

IV. REMOVAL FROM THE BLACKLIST

C. *Delegated Regulation (EU) 2022/229*

Botswana and Mauritius spent just under two years on the EU Blacklist before the European Commission removed them in January 2022.⁴³ In removing each from the list, the Commission referenced the FATF finding noting 'Botswana ...and Mauritius [had] established the legal and regulatory framework to meet the commitments in their action plans regarding the strategic deficiencies that the FATF had identified.'⁴⁴

The improvements made by each country were extensive and spanned dozens of domestic laws and international procedures. Botswana, for an instance, amended its *Banking Act* and *Income Tax Act*⁴⁵ to comply with the FATF recommendations to mitigate financial institution secrecy.⁴⁶ These changes increased and tightened bank reporting of AML/CFT matters by eliminating inconsistencies in reporting requirements across these and other Botswanan regulations. These changes supplemented requirements that Trust and Service Providers – who are often used to structure the types of avoidance schemes noted in the Mauritius and Paradise Papers – be classified as reporting entities. These further complement Botswana's amended Trust Property Control Act, which requires trustees to 'keep accurate and up-to-date information and records of the identity of the founder and beneficiaries.'⁴⁷

Mauritius made similar changes by issuing new guidelines concerning the declaration of beneficial ownership, which now require every bank to obtain from its customers the 'identity and details of the natural person(s) who is/are the ultimate beneficial owner(s) of the business relationship or transaction.'⁴⁸ Mauritius even went so far as to improve its approach to virtual assets (cryptocurrencies) by enacting the *Virtual Asset and Initial Token Offerings Services Act 2021* ('VAITOS Act').⁴⁹ The VAITOS Act requires that Beneficial ownership information [is] obtained by the Financial Services Commission ('FSC') "as part of the licensing process to ensure that the applicant can carry out their obligations as a designated person and that the applicants and each of its controllers, beneficial owners, their associates and officers are fit and proper persons to carry out the business activities to which the license is sought.' This means the days of the old and opaque GBC license are presumably over, even for the most modern financial strategies.

⁴³ *Commission Regulation 2022/229* [2022] OJ L39, 8 [20].

⁴⁴ *Ibid.*

⁴⁵ *Botswana Income Tax Act 2021* (Botswana) s 2.

⁴⁶ Eastern and Southern Africa Anti-Money Laundering Group ('ESAAMLG'), *Anti-Money Laundering and Counter-Terrorist Financing Measures: Botswana*, April 2021, s 3.1.1 [8].

⁴⁷ *Ibid* s 3.1.7. [42].

⁴⁸ *Disclosure of Beneficial Owner or Ultimate Beneficial Owner to the Registrar of Companies* [General Notice No.542 of 2020] (Mauritius). See also *Beneficial Owner, Companies and Intellectual Property Authority of Botswana* (Web Document, 2023 <<https://www.cipa.co.bw/beneficial-owner>>.

⁴⁹ *Virtual Asset and Initial Token Offerings Services Act 2021* (Mauritius).

With the desire to comply with OECD recommendations in mind, Mauritius and Botswana also approved the ratification of a new DTA that, *inter alia*, '[establishes] a framework for the exchange of information between the tax authorities of Mauritius and Botswana combatting tax evasion and other tax malpractices.'⁵⁰ This information will no doubt include details concerning beneficial ownership, residence, and other reporting improvements, as reflected in the domestic regulatory reforms previously discussed.

These Reforms are demonstrative of the reach the FATF and EU Commission have as a result of their Blacklists. They not only influence MNEs at the international level, but they can also influence domestic policy to incentivize compliance. The reason for this is simple: non-compliance means interested foreign capital may sour on a country, as MNEs move on to the greener pastures of other, more advantageous tax jurisdictions. In the wake of the EU listing Mauritius and Botswana, the two countries could not participate in the ever-growing pool of investment funds being raised worldwide; a fact that certainly offered one of many reasons for such rapid reform in both countries' financial regulations.

V. CONCLUSION

Secrecy is the hallmark of a tax haven. Concealing the beneficial owners of funds, accounts, and companies who are likely non-residents of the haven in question is the cornerstone of secrecy. A lack of information exchanged between the jurisdiction and the rest of the international taxation infrastructure enables concealment and fosters opaqueness. This is the story of Mauritius and Botswana's journey onto and off the EU Blacklist. The FATF and EU Commission identified both countries as having weak regulations concerning the identification and information exchanged relating to non-resident beneficial owners of various forms of MNEs. To escape the list, both countries placed considerable effort into changing their domestic and international regulations to comply with EU and FATF criteria.

Jurisdictions like Mauritius and Botswana are often categorized as 'Tax Havens,' a scornful term meant to denote that these countries may promote unfair or even harmful tax regimes that drain tax revenue from jurisdictions with legitimate practices. However, there is another name for these jurisdictions, and others that aspire to attract foreign financial investment: small/regional international financial centres ('IFC').⁵¹ This delineation is important because tax havens are perceived to drain revenue and provide less value than harm. But IFCs are part of a larger global market competing against one another for investment capital. One method of competitive strategy might mean little to no taxes levied on profits, and another might be to offer specialized services to a particular industry. In any case, each strategy can be viewed through the lens of the executing jurisdiction as a means to remain competitive for revenue. Or it can be viewed as a harmful practice that poses a threat to economic allies, which is which likely depends on who the allies and competitors for the jurisdiction in question are. The tax regimes that led to the listing of Mauritius

⁵⁰ Office of the Prime Minister, Mauritius, 'Highlights of Cabinet Meeting' (Web Document, 17 March 2023) 2 [5]
<<https://pmo.govmu.org/CabinetDecision/2023/Highlights%20of%20Cabinet%20Decisions%2017%20March%202023.pdf>>.

⁵¹ Pritish Behuria, 'The Political Economy of a Tax Haven: The Case of Mauritius', *Taylor and Francis Online* (Web Document, 5 May 2022),
<<https://www.tandfonline.com/doi/epub/10.1080/09692290.2022.2069144?needAccess=true&role=button>>.

and Botswana held elements of both descriptions. However, what their listing means for small/regional jurisdictions' ability to compete with larger IFCs will be a story that unfolds in the decades to come. This future is made even murkier when considering other borderline jurisdictions. Yes, the EU Commission, FATF, and OECD have proven that they can induce compliance; but with which jurisdictions and to what ends? What about Delaware, a favorite domicile for passive investment companies ('PICs') – another form of special purpose entity or 'shell' – in the United States that offers similar measures of anonymity, favorable tax rates, and physical dislocation from substantive operations as internationally recognized tax havens?⁵² The American state is home to nearly 2 million companies and 70% of the US Fortune 500 (most of which are MNEs).⁵³ South Dakota, another US state, is a little-known haven for perpetual and opaque trusts for the wealthy that allows for the shifting of estate and capital taxes from generation to generation.⁵⁴ In fairness to the United States, the international community has not been shy in its critique of Luxembourg as a potential tax haven, with leaked documents exposing corporate transactions and conspiracies to evade taxes mirroring that of Mauritius and Botswana.⁵⁵ All of these jurisdictions have teetered on being considered tax havens, yet each still benefits from the niche in the taxation market it has carved. In the end, the lines between tax haven and competitive jurisdiction may never be unblurred. But for now, Mauritius and Botswana are on the right side of it.

⁵² Changes in United States jurisprudence portend to stress test the lack of physical nexus between Delaware and the companies incorporated in the state. This shift, along with its favourable tax regime, moves Delaware closer to fitting the description of a tax haven in the minds of some researchers. See generally Andrew W Swain and John D Snethen, 'Economic Nexus Means Trouble for Tax-Haven Mavens', *Journal of State Taxation* 33 2006 24(5).

⁵³ Delaware Division of Corporations, 'Annual Report Statistics', (Web Document, 2022) <<https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report-cy.pdf>>.

⁵⁴ South Dakota laws allow wealthy families to incorporate wealth into a perpetual trust to avoid generational transfer taxes. Non-citizens of South Dakota can take advantage of these laws through banks that set up local branches to establish physical ties to the capital enshrined in their trusts. See Jesse Dukeminier and James E Krier, 'The Rise of the Perpetual Trust', *UCLA Law Review* 1303 2003 50(6).

⁵⁵ See Matthew Caruana Galizia et al, 'Explore the Documents: Luxembourg Leaks Database', *ICIJ* (Web Document, 9 December 2014) <<http://www.icij.org/project/luxembourg-leaks/explore-documents-luxembourg-leaks-database>>.